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No. 94-2072

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

L. DEWAYNE NEELY and GLENDA CAROL CHADWICK, Individually and as Administrators of the ESTATE OF GREGORY DEWAYNE NEELY,

Petitioners,

vs.

DADE COUNTY, GEORGIA, a Political Subdivision of the State of Georgia, and its BOARD OF COMMISSIONERS, in their Official Capacity,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Dade County, Georgia had a special relationship with Gregory Dewayne Neely or created a special danger faced by him sufficient to give rise to a fourteenth amendment duty on the facts of this case.

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OPINIONS AND JUDGMENT BELOW

Within the Appendix to the Petition for Writ of Certiorari Petitioners have provided the Order of the Honorable Harold L. Murphy, Judge, United States District Court for the Northern District of Georgia (hereinafter referred to as the "district court"), entered on October 29, 1993. Petitioners also include in their Appendix the March 14, 1995 decision of the United States Court of Appeals for the Eleventh Circuit (hereinafter referred to as the "Eleventh Circuit") in *Neely v. Dade County, Georgia, et al.*, No. 93-9439, (per curiam) (11th Cir., March 14, 1995). However, Petitioners have not included in their Appendix the Eleventh Circuit's per curiam denial of Petitioners' Suggestion for Rehearing *en banc*, dated May 22, 1995. Respondents have provided that decision as Appendix A hereto.

STATEMENT OF JURISDICTION

Respondents agree with Petitioners' Statement of Jurisdiction. Respondents additionally show that jurisdiction is conferred by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree that this action involves the fourteenth amendment to the Constitution of the United States and 42 U.S.C. § 1983 but deny owing any liability to Petitioners thereunder.

STATEMENT OF THE CASE

Petitioners in these proceedings were the plaintiffs in the district court, L. Dewayne Neely and Glenda Carol Chadwick. Petitioners are the parents of Gregory Dewayne Neely (hereinafter alternately referred to as "the deceased" or "Neely") and the Administrator and Administratrix, respectively, of Neely's estate. R2-18-2. Dade County, Georgia and its Board of Commissioners, in their official capacity, are Respondents herein.

On September 29, 1992, Petitioners filed this suit alleging negligence, wrongful death, and civil rights violations pursuant to 42 U.S.C. § 1983, the fifth amendment and the fourteenth amendment. R1-1-5. Specifically, Petitioners contended that Respondents:

> [M]aintained an intentional and impermissible policy of allowing emergencies such as that involved in this situation to be undertaken in an unorganized, improper and dangerous manner . . . [such acts constituting] gross negligence and were intentional and pursuant to an impermissible policy allowing unsafe distribution of equipment or materials (the rope) for emergency management purposes and deprived Greg Neely of his life.

R1-1-4. Petitioners also asserted pendent state law claims for negligence and wrongful death. R1-1-4.

On August 2, 1993, Respondents filed their Motion for Summary Judgment. R2-19. By Order entered October 29, 1993, the district court granted Respondents' motion, and judgment was entered that same day. R5-27; R5-28.

Petitioners filed their Notice of Appeal with the district court on or about November 29, 1993. R5-29-1. The Eleventh Circuit affirmed without opinion, *Neely v. Dade County, Georgia, et al.*, No. 94-9439 (11th Cir., March 14, 1995) (per curiam) and then denied Petitioners' suggestion of rehearing en banc, *Neely v. Dade County, Georgia, et al.*, No. 94-9439 (11th Cir., May 22, 1995).

The pertinent facts are as follows: Prior to the incident at issue in this litigation, Dade County, Georgia created a local organization for emergency management, the position of Emergency Management Director, and an emergency operations plan, all pursuant to the Georgia Emergency Management Act (hereinafter referred to as "GEMA"). Exhibit Folder – Deposition of Larry Moore, pp. 9-14 (hereinafter referred to as "Moore Deposition"); R3-23, Trenton – Dade County Emergency Operations Plan (hereinafter referred to as "the Plan"). The Plan identifies various hazards and assigns responsibility to organizations in the county for those hazards and assigns the Emergency Management Director primary responsibility for coordination of search, rescue and recovery. R3-23, Trenton – Dade County Emergency Operations Plan, Annex 3. In the event the Emergency Management Director is unavailable, the county sheriff has responsibility for coordinating search, rescue and recovery. R3-23, Trenton – Dade County Emergency Operations Plan, Attachment F.

It is undisputed that the original Emergency Management Director resigned on February 7, 1989, and that Dade County was without an Emergency Management

Director for the twenty (20) months immediately preceding Neely's death. Pursuant to the Plan and in compliance with GEMA's requirements, however, the county sheriff served as the interim successor during this time. R3-23, Trenton – Dade County Emergency Operations Plan, Attachment F. *See* O.C.G.A. § 38-3-50, which provides that the interim successor exercises the duties of the appointed officer (i.e., director) until a new director is appointed. During the time there was no Emergency Management Director, all rescue training and procedures continued unchanged. Exhibit Folder – Moore Deposition, pp. 12-13, and 50.

Neely worked for the Erlanger Medical Center in Chattanooga, Tennessee as a member of the Life Force helicopter ambulance unit. R1-1-2. In the late afternoon of October 2, 1990, Paul Arnold, an emergency medical technician employed by Hutcheson Medical Center, contacted the dispatcher for the Dade County Sheriff's Department. R4-25-1 and 3. Arnold asked the dispatcher to contact Life Force and request that it fly to Sand Mountain in Dade County to assist with the rescue of an individual who had fallen from the mountain. *Id.* at 2 and 3. Arnold called the Dade County Sheriff's Department because, at the time, all radio transmissions from Hutcheson EMS regarding Dade County emergencies were dispatched by the Sheriff's Department. *Id.* at 2; Exhibit Folder – Deposition of Phillip Street, pp. 46-47.

The Life Force helicopter ambulance, with Neely aboard, responded to the call. Exhibit Folder – Deposition of Kathleen Marie Coronet, p. 6 (hereinafter referred to as "Coronet Deposition"); Deposition of Daniel Edward

Norman, p. 6 (hereinafter referred to as "Norman Deposition"). When it arrived, Arnold requested that the Life Force paramedic (Neely) descend the bluff to render assistance to the man who had fallen. Exhibit Folder – Coronet Deposition, p. 7; R4-25-2. Neely agreed to do so and asked for some rappelling gear to use. R2-19, Affidavit of Delbert Wallin, p. 2 (hereinafter referred to as "Wallin Affidavit").

Prior to his descent, Neely was asked by a member of a local rescue unit if he (Neely) was experienced in rappelling. R2-19, Wallin Affidavit, p. 2. Neely said that he was, and he then hooked up the rappelling gear and descended down the bluff without incident. R2-19, Wallin Affidavit, p. 2.

Later, Neely used the rappelling gear to ascend the bluff, again without incident, and he stopped at a ledge approximately six (6) feet wide located just below the top of the bluff. R2-19, Arnold Affidavit, p. 2; Wallin Affidavit, p. 2. Delbert Wallin, a volunteer member of the Trenton Fire Department who was assisting in the rescue, was on the ledge at the same time as Neely. R2-19, Wallin Affidavit, p. 2. Neely asked for and received Wallin's assistance in removing the rappelling gear. *Id.*

Wallin then showed Neely a trail and told Neely he could safely walk to the top of the bluff on the trail. R2-19, Wallin Affidavit, p. 2. Indeed, Wallin had walked the trail several times earlier that day. *Id.* Wallin also showed Neely a white rope and told Neely to hold on to the rope as he walked up the trail. R2-19, Wallin Affidavit, pp. 2-3; R3-23, Sworn Statement of Delbert Wallin, p. 30. Petitioners' statement, at page 3 of their Petition for

Writ of Certiorari, that Neely "was then thrown a white rope by County personnel" is contrary to the evidence of record, as Wallin was a volunteer member of the City of Trenton (Georgia) Fire Department.

Wallin then returned to his business and diverted his attention away from Neely. R2-19, Wallin Affidavit, p. 3. At that time and contrary to Wallin's suggestion, Neely attempted to climb the bluff using the rope Wallin had shown him. *Id.* As Neely neared the top of the bluff, the rope broke. Neely fell some considerable distance, sustaining injuries which eventually caused his death.

SUMMARY OF ARGUMENT

While Petitioners do not reference Rule 10 of this Court's Rules in their Petition or even argue that this case merits review for any of the reasons set forth in Rule 10, it appears that review is sought pursuant to subsection .1.(c). That is, Petitioners apparently contend that the Eleventh Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." Specifically, Petitioners ask this Court to grant review of this case in order to determine whether governmental entities have a duty to non-employee rescue workers sufficient to trigger fourteenth amendment due process protections ("minimal levels of safety and security"). Petition for Writ of Certiorari, p. 5.

Certiorari should not be granted to Petitioners because the question they present is simply not appropriate for appellate review here. The question before the district court was not whether, in a general sense, a county owes a duty to

non-employees, as Petitioners have posited here. The question, as framed by Petitioners below, was whether Dade County owed Neely a duty "due to the [alleged] special relationship and [alleged] special danger present under the circumstances." R3-23, Plaintiffs' Brief in Support of Response to Motion for Summary Judgment, p. 11. In the context of the constitutional duty issue, it was this question, and this question alone, that the district court considered. Thus, the question Petitioners seek this Court to answer was never addressed by either of the courts below.

Moreover, Petitioners apparently misconstrue this Court's holding in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992). This Court did not hold in *Collins* that a fourteenth amendment duty could never arise in the context of an employment relationship; indeed, the Court pointed out instances in which such a duty *could* be found. *Collins*, 503 U.S. at 119. At the same time, the Court did not hold that a duty to provide minimal levels of safety and security would *always* be present in the non-employment context. Rather, the Court specifically noted that "[t]he employment relationship . . . is not of controlling significance." *Collins*, 503 U.S. at 119.

In short, Respondents submit there must be a factual analysis of each case to determine whether the relationship between the parties or the nature of the conduct of the government gives rise to a legal duty. This is precisely what the district court did here. It granted summary

judgment, not because it held that a governmental entity (Dade County) owes no duty to non-employees, but because it found no special relationship existed between Neely and Dade County and because it further found that Neely did not face a special danger created by Dade County. R5-27-16.

The undisputed facts show that both the district court and the Eleventh Circuit properly decided Petitioners' fourteenth amendment claim. Neely, who worked for Erlanger Medical Center in Chattanooga, Tennessee, came to the rescue scene at the request of Hutcheson EMS (albeit transmitted through the Dade County Sheriff's Department) and at the direction of his employer, not Respondents. Neely was not requested by Dade County to rappel down the bluff; Paul Arnold of Hutcheson EMS asked him to. R4-25-2. Dade County did not direct Neely to remove his rappelling gear, *he* chose to take it off. R2-19, Wallin Affidavit, p. 2. Neely was shown a path by which he could have safely walked to the top of the bluff, but *he* chose not to take it. *Id.*

The rope Neely used to climb to the top was shown him by a City of Trenton volunteer firefighter, Wallin, who told him he (Neely) could hold on to it as he walked the trail. R2-19, Wallin Affidavit, pp. 2-3; R3-23, Sworn Statement of Delbert Wallin, p. 30. Neely, using his own judgment, chose to disregard Wallin's suggestions, and instead tied the rope around his body and yelled to the workers above to pull him up. R5-27-2; R3-23, Sworn Statement of Woodrow C. Jones, p. 59. No one compelled, or even asked, Neely to use the rope in the manner in which he used it.

The courts below correctly concluded that no constitutional duty was owed by Respondents to Neely. There was no evidence of any special relationship between them, and Respondents did not restrict Neely's freedom or impair his ability to act on his own. Nor was there any evidence that any custom or policy of Dade County caused the alleged violation of Neely's rights. Finally, to the extent Petitioners argue that Respondents' negligence was the cause of Neely's death, such alleged negligence is legally insufficient to form the basis for fourteenth amendment liability.

ARGUMENT

Rule 10 of the Rules of this Court sets forth the basis upon which a Writ of Certiorari may be granted. The Rule reads in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as

> to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.

Respondents have assumed, based upon the content of the Petition for Writ of Certiorari, that subsection .1.(c) of Rule 10 is relied upon by Petitioners in support of the instant Petition. Apparently, Petitioners contend that the Eleventh Circuit, by affirming the district court's decision without opinion, has "decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1.(c). That question seemingly is whether, as a general principle of constitutional law, governmental entities owe a duty, under the Due Process Clause of the fourteenth amendment, to provide safety and security to non-employees performing governmental operations.

However, that question, which Petitioners have asked this Court to answer, was not briefed or argued below. R2-19; R3-23; R4-24. As stated above, what Petitioners asked the district court to find, in response to Respondents' motion for summary judgment, was that:

> Dade County owed Greg Neely a duty to provide an adequately trained and skilled emergency management organization, including a

> local director of emergency management so that adequately trained and supervised rescue workers would not place him in danger, but would provide some degree of protection due to the special relationship and special danger present *under the circumstances.*

R3-23, Plaintiffs' Brief in Support of Response to Motion for Summary Judgment, p. 11 (emphasis supplied). *That* is the question the district court decided in granting Respondents' motion for summary judgment. It rejected Petitioners' contention that there was either a special relationship or a special danger present under the circumstances. R5-27-14 and 15. Therefore, under the facts of this case, the district court found no duty to exist.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), this Court discussed the dimensions of its discretionary review and why cases, such as this one, are not among those for which such review will be granted.

> [W]e have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19, 28 U.S.C.A.
>
> * * *
>
> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions,

> for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 616 (citations omitted).

Applying the rationale of the *Rice* decision to this case, there can be no doubt that this case is not one presenting "special and important reasons" as required by Rule 10 (formerly Rule 19). Instead, the Court has been asked to decide a question of constitutional law not even argued by the parties below.

Moreover, Respondents submit that this Court's decision in *Collins* is dispositive of the outcome of this case. Petitioners have attempted to invoke this Court's review by suggesting that because Neely was not an employee of Dade County, this case is distinguishable from *Collins*. Yet, the Court in *Collins* specifically noted, "The employment relationship . . . is not of controlling significance." *Collins*, 503 U.S. at 119.

Continuing with this "logic," Petitioners then suggest that because Neely was not an employee, this case is more akin to the *Revere, Youngberg, Bell* and *Estelle* "custody" cases. Petition for Writ of Certiorari, p. 12. An examination of each of these cases, however, reveals a factor not present either in *Collins* or here – in each, there had been some deprivation by the state of the liberty of the claimant. Indeed, *Collins* explicitly distinguished the case before it from the line of cases urged by Petitioners here based on the fact that Collins was not deprived of his liberty.

> [Petitioner's claim] is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those *who have*

> *already been deprived of their liberty*. We have held, for example, that apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, . . . the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, *see Bell v. Wolfish*, . . . for persons in mental institutions, *Youngberg v. Romeo*, . . . and for persons under arrest, *see Revere v. Massachusetts General Hospital*, . . . The process that the Constitution guarantees in connection with any deprivation of liberty thus includes a continuing obligation to satisfy certain minimal custodial standards. *See DeShaney*,. . . .

Collins, 503 U.S. at 127-28 (citations omitted; emphasis supplied).

Those cases relied upon by Petitioners herein are distinguishable for the same reason. Petitioners cannot, in good faith, maintain that Dade County deprived Neely of his liberty when he voluntarily accepted employment with Erlanger Medical Center and voluntarily undertook the various acts that ultimately led to his death.

Petitioners' argument is flawed, because it begins with the premise that the state owes a fourteenth amendment duty to protect the lives of the public as a whole. This Court has made clear, however, that such a duty does not exist:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a

> guarantee of certain minimal levels of safety and security.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989). Instead, a duty such as that urged by Petitioners will be found only where a special relationship or special danger is present. *Collins*, 503 U.S. at 127-28; *DeShaney*, 489 U.S. at 198-99. The courts below soundly concluded that neither was present here.

In the final analysis, all Petitioners are hoping to obtain is a third chance to convince a court that the facts of their case are such that they should get to a jury. Respondents submit such a goal is not among the "special and important reasons" for which review on certiorari was designed. Accordingly, the Petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter, because the justiciable concerns required by Rule 10 of the Rules of this Court are not present. There is no need for this Court to decide the broad question presented by Petitioners, because such a decision is not needed to resolve the case now before this Court. An examination of the facts of this case and the applicable law is all that is needed. Petitioners' attempt to transform this case into something that it is not should be rejected.

The lower courts properly applied Fed. R. Civ. P. 56 in ruling Respondents were entitled to judgment as a matter of law. No genuine issues of material fact existed for trial, and Respondents showed that under the applicable law they were entitled to summary judgment.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.
DENIAL OF SUGGESTION OF REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9439

L. DEWAYNE NEELY, et al.,

Plaintiffs-Appellants,

versus

DADE COUNTY, GEORGIA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

[Filed May 22, 1995]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: JFD/PHR/ESCHBACH

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE